Supreme Court, U.S.
FILED
071499 MAY 28 2008
OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

DOUGLAS M. McKENNA,
Petitioner

v.

MICHAEL G. KRUSE
d/b/a SECURITY MORTGAGE BROKERS
Respondent

On Petition for Writ of Certiorari
To the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

Douglas M. McKenna
1140 Linden Avenue
Boulder, CO 80304
(303) 440-0707

Petitioner appears *pro se*

QUESTION PRESENTED FOR REVIEW

In a federal consumer protection statute at 47 U.S.C. § 227(b), Congress created a remedial private right of action for victims of cost-shifted, unsolicited facsimile advertising to recover statutorily set, liquidated damages, or actual damages, whichever is greater. But the Colorado Supreme Court has held, using a state substantive law analysis, that the minimum statutory damages are penalties and that a claim to recover penalties cannot be assigned in Colorado because the claims would not survive, even though the state survival statute unambiguously mandates otherwise. When a state court misreads its own state survival statute to mean the polar opposite of what that statute expressly requires, for the sole purpose of preventing a plaintiff from vindicating in state court a federal right that by the court's own analysis would otherwise be assignable, has that court erred?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Douglas M. McKenna

Michael G. Kruse, d/b/a Security Mortgage Brokers

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS TO OPINIONS BELOW	1
BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING REVIEW:	
A. The Lower Court's Decision Interweaves State and Federal Law, and Is Not Just Facially Unclear, But Also Facially Self-Contradictory and Inadequate to Support the Judgment.	7
B. There Is No Recourse Except to This Court to Correct a State Supreme Court Decision That—Having No Basis in Law—Was Made Solely to Prevent Petitioner from Vindicating a Federal Right in State Court.	15
CONCLUSION	18
APPENDIX	
ORDER OF COLORADO SUPREME COURT	App-1
ORDER OF COLORADO COURT OF APPEALS	App-12
GAO REPORT, GAO-06-425, P. 2	App-19

TABLE OF AUTHORITIES

CASES	Page
Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm. L.P., 329 F.Supp.2d 789 (M.D.La. 2004)	8
Ainscough v. Owens, 90 P.3d 851 (Colo. 2004)	App-5
Alexander v. Certified Master Builders Corp., 268 Kan. 812, 1 P.3d 899 (Kan. 2000)	14
Am. States Ins. Co v. Capital Assoc. of Jackson County, Inc., 392 F.3d 939 (7th Cir. 2004)	17
Atchison, Topeka & Santa Fe R.R. Co. v. Tanner, 19 Colo. 559, 36 P. 541 (1894)	App-9
Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc., 16 S.W.3d 815 (Tex. App. 2000)	App-16
Baker v. Bd. of Regents, 991 F.2d 628 (10th Cir. 1993)	13
Bergren v. Valentine Hardware Co., 88 Colo. 52, 291 P. 1038 (1930)	App-7,-8
Brady v. Daly, 175 U.S. 148 (1899)	14
Brown v. Gray, 227 F.3d 1278 (10th Cir. 2004)	11, 12
Carlson v. McCoy, 566 P.2d 1073 (1977)	14, App-8,-9

Chair King, Inc. v. GTE Mobilenet, Inc.,
135 S.W.3d 365 (Tex. App. 2004) App-18

Chair King, Inc. v. GTE Mobilenet, Inc.,
184 S.W.3d 707 (Tex. 2006) 8, App-15

City of Greenwood Village v. Petitioners for Proposed City of Centennial,
3 P.3d 427 (Colo. 2000) App-4

Coleman v. Thompson, 501 U.S. 722 (1991) 14-15

Colo. State Bd. of Accountancy v. Paroske,
39 P.3d 1283 (Colo. App. 2001) App-14

Condon v. Office Depot, Inc.,
855 So.2d 644 (Fla. App. 2003) 8

Consumer Crusade v. Affordable Health Care Solutions, Inc.,
121 P.3d 350 (Colo. App. 2005) 5, 8, App-15,-16

Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.,
502 F.3d. 91 (2nd Cir. 2007) 16

Consumer Crusade, Inc. v. MBA Fin. Group, Inc.,
No. 04CA2366, 2006 Colo. App. LEXIS 1621 (Colo. App. Sept. 28, 2006), *cert. denied*, 2007 Colo. LEXIS 343, 2007 WL 1181619 (Colo. Apr. 23, 2007) App-11

Credit Men's Adjustment Co. v. Vickery,
62 Colo. 214, 161 P. 297 (1916) App-7,-8

Destination Ventures, Ltd. v. FCC,

844 F.Supp. 632 (D.Or. 1994) 17

ErieNet v. Velocity Net, Inc.,
156 F.3d. 513 (3rd Cir. 1998) 8

F.D.I.C. v. Bledsoe, 989 F.2d 805 (5th Cir. 1993) 12

Ford v. Summertree Lane, LLC,
56 P.3d 1206 (Colo. App. 2002) 12

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) App-17

Howlett v. Rose, 496 U.S. 356 (1990) 8

Huntington v. Attrill, 146 U.S. 657 (1892) 14

In Re Wood, 643 F.2d 188 (5th Cir. 1980) 13, 14

Int'l Science & Tech. Inst., Inc. v.
Inacom Commun., Inc.,
106 F.3d 1146 (4th Cir.1997) 8

Interstate Savings & Trust Co. v. Wyatt,
63 Colo. 1, 164 P. 506 (1917) App-8

Kaplan v. Democrat and Chronicle,
698 N.Y.S.2d 799 (N.Y.App. 1999) 8

Kaufman v. ACS, 110 Cal.App.4th 886 (2003) 8

Kruse v. McKenna, 178 P.3d 1198 (2008) *passim*, App-1

Levitt v. Fax.com, Inc., 857 A.2d 1089 (2004) 5,8,App-18

Mason v. People, 932 P.2d. 1377 (1997) App-14

Matson v. White, 220 P.2d 864 (Colo. 1950) 11, App-6

McKenna v. Oliver,
159 P.3d 697 (Colo. App. 2006),
cert. denied, 2007 Colo. LEXIS 341,
2007 WL 1181630 (Colo. Apr. 23, 2007) App-10

Micheletti v. Moidel,
94 Colo. 587, 32 P.2d 266 (1934) 6, 11, 12, App-6

Michigan v. Long, 463 U.S. 1032 (1983) 1, 7, 9

Mourning v. Family Publications Service, Inc.,
411 U.S. 356 (1973) 14

Mulhern v. MacLeod, 808 N.E.2d 778 (Mass. 2004) 8

Nicholson v. Hooters of Augusta,
537 S.E.2d 468 (Ga.App. 2000) 8

Ohio v. Robinette, 519 U.S. 33 (1996) 1, 7

Olmstead v. Allstate Ins. Co.,
320 F.Supp. 1076 (D. Colo. 1971) 9, 11

Palmer v. A.H. Robins Co., Inc.,
684 P.2d 187 (Colo. 1984) App-8,-9

Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984) 10

People v. Dist. Court, 713 P.2d 918 (Colo. 1986) App-14

Perini v. Cont'l Oil Co.,
68 Colo 564, 190 P. 532 (1920) App-8

Peters v. Smuggler-Durant Mining Corp.,
910 P.2d 34 (Colo. App. 1995)
aff'd on other grounds,
930 P.2d 575 (Colo. 1997) App-5

Phelps v. McDonald, 99 U.S. 298, 304 (1878) 12

Prudence Realization Corp. v. Geist,
316 U.S. 89 (1942) 13

Publix Cab Co. v. Colo. Nat'l Bank,
139 Colo. 205, 338 P.2d 702 (1959) 9

R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.,
857 A.2d 1 (Md. 2004) 5, 8, App-15

Reynolds v. Diamond Foods & Poultry, Inc.,
79 S.W.3d 907 (Mo. 2002) 8

Rohauer v. Little, 736 P.2d 403 (Colo. 1987) App-8

Schulman v. Chase Manhattan Bank,
710 N.Y.S.2d 368 (N.Y.App. 2000) 8

Seefried v. Hummel, ___ P.3d. ____
(Colo. App. No. 04CA0960, July 28, 2005) App-14

Smith v. Dept. of Human Services,
876 F.2d 832 (1989) 14

Sola Elec. Co. v. Jefferson Elec. Co.,
317 U.S. 173 (1942) 13

State Bd. for Cmty. Colls. & Occupational Educ. v. Olson,
687 P.2d 429 (Colo. 1984) App-5

Tafflin v. Levitt, 493 U.S. 455 App-17

Terra Nova Ins. Co. v. Fray-Witzer,
869 N.E.2d 565, 449 Mass. 406 (Mass. 2007) 14

Tivoli Ventures, Inc. v. Bumann,
870 P.2d 1244 (Colo. 1994) 12, App-5

U.S. Fax. Law Ctr., Inc. v. Data Design Specialists, Inc., No. s06CA0433,
2007 Colo. App. LEXIS 2454
(Colo. App. Dec. 20, 2007) App-10

U.S. Fax Law Ctr., Inc. v. iHire, Inc.,
362 F. Supp. 2d 1248 (D. Colo. 2005) App-10

U.S. Fax Law Ctr., Inc. v. iHire, Inc.,
476 F.3d 1112 (10th Cir. 2007) App-5,-10

U.S. Fax Law Ctr., Inc. v. Myron Corp.,
159 P.3d 745 (Colo. App. 2006),
cert. denied, 2007 Colo. LEXIS 335,
2007 WL 1181623 (Colo. Apr. 23, 2007) App-10

U.S. Fax Law Ctr., Inc. v. T2 Techs., Inc.,
No. 06CA0432, 2007 Colo. App.
LEXIS 2378, *16 (Colo. App. Dec. 13, 2007) App-10

U.S. v. Gilbert, 181 F.3d 152 (1st Cir. 1999) 10

U.S. v. Weathers, 169 F.3d 336 (6th Cir. 1999) 10

Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network,
401 F.3d 876 (8th Cir. 2005) 14

USA Tax Law Ctr., Inc. v. MBA Fin. Group, Inc.,
No. 05CA1671, 2007 Colo. App. LEXIS 56
slip op. at 5-8 (Colo. App. Jan. 18, 2007),
cert. denied, 2007 Colo. App. LEXIS 56,
2007 WL 1181616 (Colo. Apr. 23, 2007) App-10

Webb v. Dessert Seed Co.,
718 P.2d 1057 (Colo. 1986) 12

Western Auto Supply Co. v. Gamble-Skogmo, Inc.,
348 F.2d 736 (1965) 12

Wilson v. Garcia, 471 U.S. 261 (1985) 13

Zelma v. Market U.S.A.,
778 A.2d 591 (N.J.Super.A.D. 2001) 8

STATUTES

39 U.S.C. § 3017(e) 8

47 U.S.C. § 227 2, App-2,-13

47 U.S.C. § 227(a)(4) (2003) 2

47 U.S.C. § 227(b) 4, 17

47 U.S.C. § 227(b)(1)(C) 10, App-14

47 U.S.C. § 227(b)(3) 3, 5, 7, 8, 13, 17,
App-4,-5,-7,-14.-15

47 U.S.C. § 227(c) 17

47 U.S.C. § 227(e)(1) 2, App-6

47 U.S.C. § 227(f)(1) 13

47 U.S.C. § 152(b) 2

47 U.S.C. § 414 2

Colorado Consumer Protection Act (CCPA)
§ 6-1-101 to 6-1-1120
COLO. REV. STAT. (2003) App-3,-13,-16

§ 6-1-702(1)(c), C.R.S. (2005) App-17

Colorado Survival Statute,
§ 13-20-101
COLO. REV. STAT. (2003) 3, 6, 9-11, App-6-7,-8,-10

Colo. Sess. Laws 1997,
ch. 133, § 6-1-105(1)(I) App-16
Federal Communications Act of 1934 2

PUB. LAW 102-243, 105 Stat. 2394 (1991) 2

Telephone Consumer Protection Act 2, *passim*

OTHER AUTHORITIES

133 Cong.Rec. H7214 (Aug. 6, 1987) 17

135 Cong. Rec. E1462-02 (May 2, 1989) 17

General Accounting Office Report, GAO-06-425,
Report to Congressional Committees,
Telecommunications, Weaknesses in
Procedures and Performance Management

Hinder Junk Fax Enforcement,
April 2006, p. 2 17-18, App-19

SEN. REP. No. 102-178, at 1,
reprinted in 1991 U.S.C.C.A.N. 1968 2

H.R. REP. NO. 102-317, at 10, 25 (1991) 17

COLORADO CONSTUTION, ART III
Separation of Powers Clause 11, 15

U.S. CONSTITUTION, ART. VI,
Supremacy Clause 1,13,
App-15,-17

U.S. CONSTITUTION, ART I, § 8,
Commerce Clause 1, 2, 10

U.S. CONSTITUTION, 10TH AMENDMENT 5

OPINIONS BELOW

The reported Order of the Colorado Supreme Court, *Kruse v. McKenna*, 178 P.3d 1198 (Colo. March 3, 2008) is found in the Appendix hereto, at App-1.

The unpublished Order of the Colorado Court of Appeals is found in the Appendix hereto, at App-12.

BASIS FOR SUPREME COURT JURISDICTION

The Colorado Supreme Court entered its **Judgment Reversing, En Banc** on March 3rd, 2008. Under Rule 13.1 of this Court, Petitioner timely seeks review of that final judgment. The judgment is grounded in and/or interwoven with federal law, and is not based on facially clear, adequate, or independent state law grounds. *See Michigan v. Long*, 463 U.S. 1032, 1038-39 (1983); *Ohio v. Robinette*, 519 U.S. 33, 36-37 (1996). This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., ART VI, cl. 2; Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., ART I, §8, cl. 1, 3; Commerce Clause:

Congress shall have power ... To regulate Commerce with foreign nations, and among the several States ... .

STATUTES INVOLVED IN THE CASE

The Telephone Consumer Protection Act of 1991, PUB. LAW 102-243, 105 Stat. 2394 (Dec. 20, 1991), amended Chapter 5 of the Federal Communications Act of 1934 ("FCA"), by creating 47 U.S.C. § 227 (the "TCPA"). The Act additionally amended 47 U.S.C. § 152(b) to include the newly created § 227 in the list of sections of the FCA that additionally regulate intrastate telecommunications as well as interstate and foreign. The TCPA does not occupy the field: Congress enacted federal provisions as a uniform regulatory floor upon which State legislatures could build their own consumer protection telemarketing regulations, *see* § 227(e) (TCPA clause expressly saving more restrictive state regulation); 47 U.S.C. § 414 (the general Chapter 5 clause saving all remedial causes of action, whether statutory or at common law).

Much of the TCPA is devoted to voice-telemarketing provisions enacted to protect residential telephone subscriber privacy. But its facsimile provisions banning so-called "cost-shifted" advertising were enacted "to facilitate interstate commerce by restricting certain uses of facsimile machines ... ." Sen. Rep. No. 102-178, at 1, reprinted in 1991 U.S.C.C.A.N. 1968. At the time the underlying action was brought in 2003, the TCPA prohibited anyone from sending an unsolicited advertisement to a telephone facsimile machine (a "junk fax"). The statute defined an *unsolicited advertisement* as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4) (2003).

Among several independent enforcement provisions, the TCPA provides a remedial private right of action to

sue for either actual or statutory damages, whichever is greater, and to obtain injunctive relief:

> 47 U.S.C. § 227(b)(3). PRIVATE RIGHT OF ACTION—A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State–
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> (C) both such actions.
> If a court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

The Colorado Survival Statute § 13-20-101 COLO. REV. STAT . (2003), in relevant part, states:

> § 13-20-101. What actions survive.
> (1) All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed ... .

STATEMENT OF THE CASE

In October 2003, Petitioner Douglas M. McKenna, filed a Complaint in state court against a dozen Defendants, including Respondent Michael G. Kruse d/b/a Security Mortgage Brokers, asserting claims for statutory damages and injunctive relief under the TCPA at 47 U.S.C. § 227(b) and its implementing regulations. The Defendants had individually sent or caused to be sent, in varying respective quantities, over one hundred unsolicited advertisements to the fax machines of a variety of recipients in Boulder, Colorado. Among the recipients were McKenna's parents, brother, and several friends, as well as McKenna's home-based business, Mathemaesthetics, Inc., and two other local businesses. One of those local businesses was a Colorado corporation, Harrington Homes, Inc., to which three unsolicited fax advertisements touting Kruse's mortgage services were sent.

Although McKenna's own corporation had been sent some thirty-nine unsolicited fax ads from other defendants, McKenna did not personally receive any of the unsolicited fax ads at issue. As Plaintiff, he was proceeding as an assignee of each recipient of these "junk faxes." The recipients were all individuals and businesses that had assigned to McKenna all right, title, and interest to their junk faxes as well as all TCPA or other claims the assignors had in connection with those junk faxes.

At the request of the Defendants, the trial court severed the original action into individual cases, of which *McKenna v. Kruse* is the underlying action at issue here. On January 3, 2005, after a bench trial at which the assignor testified that the three junk faxes were unsolicited, and after consideration of post-trial motions, the trial court dismissed the action for lack of subject matter jurisdiction over the Plaintiff's TCPA claims. The trial

court's reasoning was based on another Colorado trial court decision it found persuasive, *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, Case No. 04CV803 (Denver Dist. Ct., July 26, 2004) which held that Colorado had "opted out of" or not yet "opted in to" jurisdiction with regard to the the TCPA's private right of action. As the plaintiff in *Consumer Crusade* had done earlier, Plaintiff McKenna also appealed.

On August 3, 2006, the Colorado Court of Appeals reversed the judgment of the trial court. *McKenna v. Kruse*, No. 05CA0191 (Colo. App. Aug. 3, 2006), *see* Appendix hereto at App-12. Citing *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, 354-55 (Colo. App. 2005), the Court of Appeals agreed that the ambiguous statutory proviso "if otherwise permitted by the laws or rules of court of a state" in the TCPA's private right of action, 47 U.S.C. § 227(b)(3), cannot be construed as affecting state court jurisdiction, nor creates any 10th Amendment infirmities. Rather, the court held that the proviso is to be interpreted as merely an acknowledgement that states may apply their own neutral laws or rules of court administration, and that therefore Colorado courts must exercise jurisdiction over private TCPA claims. *See Kruse*, at App-15-16, *citing R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 857 A.2d 1, 382 Md. 689 (Md. 2004); *Levitt v. Fax.com, Inc.*, 857 A.2d 1089, 383 Md. 141 (Md. 2004). The Court of Appeals concluded that the trial court had erred in dismissing the action for lack of subject matter jurisdiction, and reversed and remanded the case for further proceedings. *See* App-18, at ¶21.

Defendant-Appellee Kruse then petitioned the Colorado Supreme Court for writ of certiorari, which was granted. After briefing on the opt-in/opt-out vs. acknowledgment issue, the court agreed to hear supplemental

briefing on a different and not previously raised jurisdictional issue: whether Respondent McKenna's assignments of TCPA claims were void as a matter of law. Its resulting decision, appended hereto at App-1, declared that TCPA claims cannot be assigned in Colorado, and that therefore McKenna did not have standing. The court reached its conclusion solely on the basis of reasoning that if TCPA statutory damages are penalties, then a claim for a penalty is unassignable because such claims would not survive under Colorado law.

Citing *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934), the Colorado Supreme Court stated that "assignability and survivability go hand-in-hand." (App-6, ¶10), and that "[i]f the claims of McKenna's assignors are claims for 'penalties' that do not survive according to [the Colorado Survival Statute], then those claims could not be validly assigned to McKenna." App-7, at ¶10. But the court then declared without any analysis that the Colorado Survival Statute precludes the survival of causes of action for penalties, even though the statute expressly mandates that all causes of action survive except for libel, slander, and those in which penalties are sought against someone who has died (see App-6, ¶10). The court then conducted an analysis under substantive state law rather than federal law to determine that TCPA claims for statutory minimum damages are claims for penalties. The court concluded that, by analogy to what the state survival statute purportedly says, claims for penalties are unassignable.

As a result, the court held that the assignments were void. From that, it followed that McKenna as assignee was without a valid "injury-in-fact," and therefore lacked standing to assert the federal TCPA rights that his assignors had transferred to him. The court then declined to review the subject matter jurisdiction issues

in the original petition, leaving the lower Colorado Court of Appeals decision (*see* App-12) intact, and remanded the case to the trial court with instructions to dismiss with prejudice.

REASONS FOR GRANTING REVIEW:

A. The Lower Court's Decision Interweaves State and Federal Law, and Is Not Just Facially Unclear, But Also Facially Self-Contradictory and Inadequate to Support the Judgment.

In *Michigan v. Long*, 463 U.S. 1032 (1983), Justice O'Connor held for the majority that this Court has jurisdiction to review a state court's decision when two prongs are satisfied. First, when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and second, "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *id.* (emphases added). In his dissent with which three other justices concurred, Justice Stevens wrote, "in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard." *id.*, at 1068 (emphasis added). The instant case falls squarely within the meaning of this holding and the dissent, as well as a long line of cases that rest on *Michigan*'s clarification of Supreme Court jurisdiction over certain state court decisions, *see, e.g., Ohio v. Robinette*, 519 U.S. 33, 36-37 (1996).

The Colorado Supreme Court began by concluding that the TCPA's private right of action's ambiguous proviso, "if otherwise permitted by the laws or rules of court of a State", 47 U.S.C. § 227(b)(3), permits it to rely on

substantive state law (App-5, at ¶8) rather than just the neutral laws of or rules of court administration and procedure.[1] Regardless of whether this suspect interpreta-

1. The proviso in 47 U.S.C. § 227(b)(3)'s private right of action is regularly held as ambiguous. It has spawned a decade of legal turmoil and conflict throughout the federal and state court systems, including Colorado's. *See Consumer Crusade v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, 354-55 (Colo. App. 2005). *See also Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm. L.P.*, 329 F.Supp.2d 789 (M.D.La. 2004); *Int'l Science & Tech. Inst., Inc. v. Inacom Commun., Inc.*, 106 F.3d 1146 (4th Cir.1997); *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 382 Md. 689, 857 A.2d 1 (Md. 2004); *Levitt v. Fax.com, Inc.*, 857 A.2d 1089, 383 Md. 141 (Md. 2004); *Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004); *Condon v. Office Depot, Inc.*, 855 So.2d 644, 647 (Fla. App. 2003); *Kaufman v. ACS*, 110 Cal.App.4th 886 (2003); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002) (en banc); *Zelma v. Market U.S.A.*, 778 A.2d 591 (N.J.Super.A.D. 2001); *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y.App. 2000); *Nicholson v. Hooters of Augusta*, 537 S.E.2d 468 (Ga.App. 2000) (en banc); *Kaplan v. Democrat and Chronicle*, 698 N.Y.S.2d 799 (N.Y.App. 1999), *Chair King v. GTE Mobilenet of Houston, Inc.*, 184 S.W.3d 707 (Tex. 2006).

Until the recent conflicting *Chair King* Texas decision, the consensus of the courts, evolving since 2000, was that the first *Int'l Science* decision was not well-reasoned, and that a clear statement rule requires that the "if otherwise permitted ..." proviso merely acknowledges that federal law takes state court rules of procedure or other neutral laws related to state court administration as it finds them, as declared in *Howlett v. Rose*, 496 U.S. 356, 357 (1990) in whose shadow the TCPA was drafted. The acknowledgment interpretation also comports with the Congressional intent that federal TCPA claims be brought in state small claims courts, *see, e.g., ErieNet v. Velocity Net, Inc.*, 156 F.3d. 513, 515 (3rd Cir. 1998)(quoting legislative history), which are typically courts of limited jurisdiction. *See also*, 39 U.S.C. § 3017(e) (same proviso, minimum statutory damages in a private right of action, without provision for recovering attorney fees, regarding prohibited postal mailings). *See also* footnote 3.

tion of the proviso comports with principles of federalism, or with Congressional intent, or with a jurisdictional clear statement requirement, it unquestionably constitutes the interweaving of federal with state law.

Continuing, the lower court then goes on to rest the entire weight of its reasoning on analogizing to the Colorado Survival Statute, § 13-20-101 COLO. REV. STAT. (2003). Yet this statute provides *no purchase whatsoever* for their conclusion. Indeed, it mandates the diametric opposite.

Satisfying the second prong of *Michigan v. Long*, the decision is unclear on its face. To wit, it continues by repeating the oft-stated legal maxim that "assignability and survivability go hand in hand" (App-6, ¶10), and, accordingly, the Colorado Survival Statute is where to look for guidance. This by itself is clear and has been the proper course of reasoning in Colorado for a half-century, *see, e.g. Olmstead v. Allstate Ins. Co.*, 320 F.Supp. 1076 (D. Colo. 1971); *Publix Cab Co. v. Colo. Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959)(both cases reciting the long history of the state survival statute). Yet in pertinent part, that survival statute mandates:

> *All causes of action*, except actions for slander or libel, *shall survive* and may be brought or continued *notwithstanding the death of the person in favor of* or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after *the death of the person* ***against whom*** such punitive damages or penalties are claimed .... .

§ 13-20-101 COLO. REV. STAT. (2003)(emphases added). Because this statute derogates the common law that all actions die with the person, it must be strictly construed.

It is here that the lower court's unanimous train of thought spectacularly derails. The statutory language of the survival statute is plain and unambiguous: it expressly requires that regardless of whether a plaintiff or defendant dies, all causes of action in Colorado shall survive, with three exceptions: (1) slander, (2) libel, and (3) when punitive damages or a penalty is sought against someone who has died. The intent of the third exception is obvious: no societal purpose is served by punishing a dead person. But there is not a whiff of ambiguity concerning the Colorado legislature's forthright meaning: when a punishable person is alive, a plaintiff's death is of no consequence—the plaintiff's survivor/estate can still maintain an action for a civil penalty or punitive damages against any living defendant (as long as the action is not libel or slander).

The telephone system, whether interstate or intrastate, is an instrumentality of interstate commerce. *Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir. 1984), *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1999), *United States v. Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999). Remotely abusing that instrumentality to commandeer an automated facsimile machine to shift one's marketing costs by printing an unsolicited advertisement on someone else's physical property without the owner's prior express invitation or consent is, *inter alia*, an act of conversion, *see, e.g.*, *Rossario's Fine Jewelry, Inc. v. Jurgens Fine Jewelry, Inc.*, 2007 WL 19611779 (Ill.Cir. Jan. 19, 2007)(holding that a junk fax satisfies all elements of conversion)(judicial notice requested). And it is also a violation of the TCPA's junk fax provisions, regardless of whether a business or individual owns the machine and its supplies, regardless of the type (residential vs. business) of telephone subscriber. § 227(b)(1)(C). Sending a junk fax is certainly neither slander nor libel,

nor, as the lower court points out (App-6, at n.1, citing *Matson v. White*, 122 Colo. 79, 84, 220 P.2d 864, 866 (1950)), is it a personal injury involving matters of trust, confidence, or personal services. But as indicated by the underlined emphasis the lower court placed on its own quote of the above statutory language (*see* App-6-7, ¶10), seven justices of the Colorado Supreme Court have managed to completely miscomprehend the third exception to mean precisely the opposite of what it says. No amount of judicial interpretation can ever change the fact that *against whom* does not mean *in favor of whom*. Dispositively, Defendant Kruse, the person against whom any TCPA damages award would accrue to the plaintiff in the underlying action, was personally introduced by his attorney to the Colorado justices as present during oral argument on Jan. 24, 2008. The record contains no announcement of his demise, and to the undersigned's knowledge, Mr. Kruse is not now—nor has he ever been—deceased.

If it were true that an action for a penalty against a defendant in Colorado could not survive a plaintiff's death, then yes, by analogy, the chose-in-action would ("hand-in-hand", *Micheletti, supra*) not be assignable. *See Olmstead v. Allstate Ins. Co.*, 320 F.Supp. at 1078. But the court's facially unsupportable conclusion is flat-out backwards from what the Colorado legislature has mandated, akin to "reasoning" that because 2 + 2 = 4 then, "by analogy," 3 + 3 = 0. But subtraction cannot be mistaken for addition, and likewise, the Colorado Supreme Court cannot violate Art. III of the Colorado Constitution ("separation of powers") by declaring at its whim that the second *against whom* clause in the statute actually means *in favor of whom*, the polar opposite of what the plain language of this to-be-strictly-construed statute says. *See Brown v. Gray*, 227 F.3d 1278, 1294

(10th Cir. 2004) (stating that all causes of action in Colorado survive the death of the party entitled to sue, and are ordinarily assignable). When—without any basis in law—the court then discards a century of well-reasoned state case law (*see* App-7-8, ¶12) in complete conformity with the survival statute, the inescapable conclusion is that the court's sole purpose was to do whatever it could to impede the enforcement of federal policy in Colorado state courts, by denying McKenna his federal right to sue in state court as an assignee of a federal chose-in-action sounding in economic harm to and tortious interference with a business's property.[2]

Because Defendant Kruse is alive, under Colorado law he is liable for federal damages to the survivors and assignees of a business whose property and economic interests he has harmed, *even if those remedial damages are held to be primarily—or entirely—a civil penalty.* The proper analogy that the lower court missed is that it is the assignor—not the defendant—who has figuratively

---

2. Federal and Colorado law overwhelmingly support the assignability of claims sounding in property harms. "The right to *indemnity* for the unjust *capture or destruction of property*, whether the wrongdoer be the government or the individual, is clearly [assignable].," *Phelps v. McDonald*, 99 U.S. 298, 304 (1878)(emphasis added, see footnote 4 herein concerning statutory damages and indemnity); *F.D.I.C. v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993) (impairing assignment "runs contrary" to the federal policy underlying the claims); *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 740-41 (1965) ("a cause of action in tort which *emanates* from breach of the *statutory* duty ... *designed to safeguard property rights*" is survivable and assignable)(emphasis added); *see also Brown v. Gray*, 227 F.3d at 1294; *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994); *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1068 (Colo. 1986); *Micheletti*, 32 P.2d at 267-68 (Colo. 1934); *Ford v. Summertree Lane, LLC*, 56 P.3d 1206, 1209 (Colo. App. 2002).

"died" and whose rights have transferred; Plaintiff McKenna as assignee is the legal "survivor" of his assignors.

Once this error is corrected, the Colorado Supreme Court's subsequent inappropriate substantive state law analysis[3] (App-8-10, ¶¶13-16) of whether TCPA damages are a penalty becomes wholly superfluous. Assuming, *arguendo*, that the TCPA's liquidated damages are not indemnification for uncertain harms nor (even more importantly) incentives for private enforcement in the absence of attorney fees, but rather are primarily or exclusively penalties,[4] these distinctions simply don't matter. The Colorado legislature has expressly mandated that the penalty issue doesn't implicate survivability when the defendant—"against whom" penalties might accrue to a plaintiff—is alive.

This Court has declared that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is

---

3. Regardless of the TCPA's private right of action's proviso, which properly interpreted concerns only venue and other neutral laws of or rules of state court administration, the characterization of the substance or nature of a federal statute is not a state substantive law question, it is a federal question, *Prudence Realization Corp. v. Geist*, 316 U.S. 89, 95 (1942); *Wilson v. Garcia*, 471 U.S. 261, 268-71 (1985); *Baker v. Bd. of Regents*, 991 F.2d 628, 630-32 (10th Cir. 1993), that depends on Congression intent, federal policy, federal caselaw, and federal statutory construction rules, *see, Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 175 (1942), *In Re Wood*, 643 F.2d 188, 190 at n.5 (5th Cir. 1980)(the remedial/penal nature of statutory damages under federal TILA is a federal question). For example, it makes no sense whatsoever to construe the intent of the TCPA under state substantive law for "private attorney general" actions, but under federal substantive law for State attorney general actions. *Compare* 47 U.S.C. § 227(b)(3) (right of action with proviso) *with* 47 U.S.C. § 227(f)(1) (right of action in federal court without proviso).

independent of the federal question *and* adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722,

---

4. A holding that TCPA damages are penalties defies Congressional intent by nullifying the long-standing federal doctrine that liquidated damages serve multiple remedial purposes, including incentive to enforce the law in the absence of attorney fee provisions, and indemnification for uncertain harms that occur due to violation of the fundamental property right of exclusive dominion (e.g. consent). "Whether we view the fixed award as a liquidated sum for actual harm or an incentive for aggrieved parties to act as private attorneys general, or both, it is clear that the fixed amount serves more than purely punitive or deterrent goals." *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network*, 401 F.3d 876, 881 (8th Cir. 2005)(holding that TCPA damages for unsolicited fax advertisements were not penalties for insurance purposes). *See Huntington v. Attrill*, 146 U.S. 657, 667 (1892)(delineating remedial vs. penal laws, and stating that minimum statutory damages are a form of indemnity); *Brady v. Daly*, 175 U.S. 148, 154 (1899)(statutory damages in copyright law compensate for uncertain harms); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 376 (1973)(upholding Truth in Lending Act provision for $100-$1000 statutorily-prescribed damages); *In Re Wood*, 643 F.2d 188, 190-95 (5th Cir. 1980)(statutory damages under TILA are remedial); *Smith v. Dept. of Human Services*, 876 F.2d 832 (1989)(stating that the fact-specific and extraordinary legislative history of ADEA shows damages were intended to be penal); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 575, 449 Mass. 406, 420 (Mass. 2007)(concluding that TCPA damages are remedial). Worse, the lower court's purported "modern" state test (App-8-9, ¶12) of what a penalty is, is based on *Carlson v. McCoy*, 193 Colo. 391, 393-94, 566 P.2d 1073, 1075 (1977). But *Carlson* is an inapposite decision that, e.g., the Kansas Supreme Court, in a well-reasoned decision *in conformity with the above-cited federal doctrine*, has expressly distinguished and discounted when it comes to determining the multiple remedial purposes of liquidated statutory minimum and treble damages in a consumer protection statute's private right of action, *see Alexander v. Certified Master Builders Corp.*, 268 Kan. 812, 823, 1 P.3d 899, 907 (Kan. 2000)(*citing Huntington v. Attrill, supra*).

729 (1991) (emphasis added). The lower court's facially self-contradictory reasoning is plainly not "adequate" to support its judgment. Were the decision's self-contradictory nature "sufficient to support the judgment", *id.*, then any decision of this Court would be advisory. But because the lower court's reasoning is barren of any logically defensible basis in state law (never mind that it violates the Colorado Constitution's Art. IIII separation of powers provision), this Court has jurisdiction to correct a blatant error.

Accordingly, because the Colorado Supreme Court's conclusion directly impedes federal policy re "private attorney general" enforcement of the TCPA, by denying Petitioner McKenna the ability to enforce his assigned federal rights in state court—*rights that the lower court in the same opinion indicates would otherwise be, hand-in-hand, assignable*—review is warranted.

B. There Is No Recourse Except to This Court to Correct a State Supreme Court Decision That—Having No Basis in Law—Was Made Solely to Prevent Petitioner from Vindicating a Federal Right in State Court.

The lower court is the highest court in the State of Colorado. Petitioner McKenna has no further recourse except to this Court to correct a patently unfair, inadequately reasoned, facially unclear, self-contradictory, indefensible-at-law, legal error that directly precludes United States citizens in Colorado, including McKenna, from vindicating a federal right to bring an assigned TCPA cause of action in state court, *regardless* of whether TCPA damages are penalties under either an inappropriate state substantive law or a proper federal

substantive law analysis. McKenna's TCPA causes of action are, hand-in-hand, assignable if they survive, and state law *requires* they survive unless Defendant Kruse dies.

This Court's correction will restore and protect McKenna's right to enforce—particularly with respect to the TCPA's injunctive relief, unavailable in "inexpensive" small claims courts—a federal consumer protection statute "in the shoes" of his assignors, who desired to transfer their TCPA junk fax claims to someone willing and better able to bring them, *see Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d. 91, 99-103 (2nd Cir. 2007)(holding that assignees can be class representatives, reciting the evolution of the increasingly liberal doctrine of assignment, stating that assignments permit claim holders to transfer loss/benefit risk of enforcement/litgation to those better able or willing to take it on). *See also, e.g., Eclipse Mfg. Co. v. M and M Rental Center, Inc.*, No. 06C1156, 2007 WL 1468605, at *2-3 (N.D. Ill. May 18, 2007)(TCPA fax claims are assignable as property torts)(judicial notice requested).

The evident antipathy of the Colorado appellate judiciary to assigned TCPA junk fax actions has manifestly blinded them to their duty to uphold the law, to harmonize all aspects of the law so as to avoid absurdities, to give meaning to and effectuate Congressional intent, to seek judicial economies whenever possible, and to aid in the strong and efficient "private attorney general" enforcement of a federal remedial consumer protection statute. The TCPA's purpose—with respect to junk faxes—is to protect from abuse an instrumentality of interstate commerce, and ultimately to protect the common law property rights of telephone facsimile machines' owners from the actual and uncertain harms of cost-shifted, commercial advertising, just as Congress

intended. The legislative history of the TCPA's fax provisions—as opposed to its voice-telemarketing and residential privacy provisions[5]—makes clear that Congress was concerned about economic harms. "[T]he recipient assumes both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out [fax] messages." H.R. Rep. 102-317, at 10, 25 (1991)(emphases added); *see Destination Ventures, Ltd. v. FCC*, 844 F.Supp. 632, 635-37 (D.Or. 1994); *Am. States Ins. Co v. Capital Assoc. of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004)("Every junk fax invades the recipient's property interest in consumables"). Accordingly, junk faxes are a commercially motivated interference in interstate commerce, and all TCPA fax claims are assignable tort claims for injury to property.

As the recent burst of junk fax TCPA litigation shows, the property harms of junk faxes are as pervasive in Colorado as everywhere else in the nation:

> "In 2000, FCC recorded about 2,200 junk fax complaints; in 2005, it recorded over 46,000. ... Since 2003, consumers complained more to the FCC about junk faxes than about any other issue under

---

5. The TCPA has two private rights of action, one per subsection, as a result of (inartfully) melding earlier bills with separate purposes, compare "The Facsimile Advertising Regulation Act of 1989", 135 Cong. Rec. E1462-02 (May 2, 1989)(whose intent was to "make it possible for businesses and individuals, [to be free] of ***the cost*** and intrusion of the unwanted advertising"), with "The Telephone Solicitation Privacy Protection Act", 133 Cong.Rec. H7214 (Aug. 6, 1987)(which—without mentioning fax ads—was limited to residential subscribers receiving live or automated ("machine") voice telephone calls)(emphases added). The first subsection, § 227(b), at issue here, concerns abuses of automated equipment; § 227(c) concerns subscriber privay rights.

> FCC's jurisdiction except indecency and obscenity in radio and television broadcasting."

GAO Report 06-425, *Report to Congressional Committees, Telecommunications, Weaknesses in Procedures and Performance Management Hinder Junk Fax Enforcement*, April 2006, at 2; *see* Appendix, at App-19.

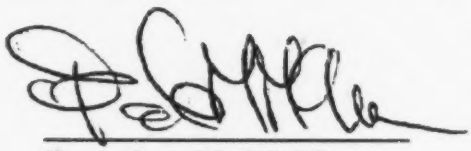
Accordingly, for all the foregoing reasons, in order to preserve and protect the federal rights of not just Petitioner McKenna and his assignors, but of all assignors and assignees of TCPA junk fax causes of action under 47 U.S.C. § 227(b)(3) in the State of Colorado, this Court should grant review.

CONCLUSION

Petitioner McKenna respectfully requests that this Court grant the petition for writ of certiorari to resolve the questions presented so as to correct the error(s) of the lower court.

Dated: May 30, 2008

Respectfully submitted,



Douglas M. McKenna

Douglas M. McKenna, *pro se*
1140 Linden Avenue
Boulder, Colorado 80304
(303) 440-0707

APPENDIX

2008 WL 553743 2008 Colo. LEXIS 203

---

178 P.3d 1198 (Colo. 2008)

SUPREME COURT OF COLORADO
Case No. 06 SC 555

Michael G. Kruse, d/b/a Security Mortgage Brokers
Petitioner-Appellant-Defendant

v.

Douglas M. McKenna
Respondent-Appellee-Plaintiff

JUDGMENT REVERSED, EN BANC

March 3, 2008

COUNSEL: Larry Dean Valente, Westminster, Colorado, Attorney for Petitioner.

Law Offices of Andrew L. Quiat, P.C., Andrew L. Quiat, Englewood, Colorado; Sawaya, Rose, Funderburg & Kaplan, P.C. Richard B. Rose, Denver, Colorado, Attorneys for Respondent.

The Demirali Law Firm P.C., A.M. Demirali, Denver, Colorado, Attorney for Amicus Curiae Consumer Crusade, Inc.

Spies, Powers & Robinson, P.C., Jack D. Robinson, Denver, Colorado, Attorney for Amici Curiae Stephen C. Oliver; Stephen Oliver Holdings, Inc., d/b/a Mile High Karate; MHK South University, Inc.; Mile High Karate, LLC and Martial Arts Marketing, LLC.

Faegre & Benson LLP, Brandee L. Caswell, Denver, Colorado, Attorney for Amicus Curiae iHire, Inc.

JUSTICE RICE delivered the Opinion of the Court.

[¶1] In this case we address whether the plaintiff, Douglas M. McKenna, has standing to assert in Colorado state court an assigned claim for violation of the facsimile transmission provisions of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2003). This issue was raised for the first time on appeal to our court. Applying Colorado state law, we find that a claim for liquidated damages under the TCPA is a claim for a penalty which cannot be assigned. Because McKenna only asserts TCPA claims that were purportedly assigned to him, we find he lacks standing to bring his claims.

I. Facts and Procedural History

[¶2] In 2003, Douglas M. McKenna filed suit against Michael G. Kruse in Boulder County District Court. McKenna's Complaint alleged that Kruse sent three unsolicited facsimile (fax) advertisements to McKenna's assignor, Harrington Homes, Inc., in 2002 and 2003, in violation of the TCPA. In his C.R.C.P. 26(a)(1) initial disclosures and subsequent pleadings, McKenna clarified that he was seeking the remedies of $500 per violation of the TCPA, and a trebling of that amount for willful violations.

[¶3] The trial court granted Kruse's motion to dismiss the action for lack of subject matter jurisdiction, ruling that the Colorado Consumer Protection Act (CCPA), sections 6-1-101 to 6-1-1120, C.R.S. (2003), precluded TCPA actions from being brought in Colorado state courts, and therefore deprived the trial court of subject matter jurisdiction. The court of appeals reversed the trial court's dismissal of the action, finding that the interaction of Colorado and federal law allowed parties to sue in state court under the TCPA, the CCPA, or both, and that therefore the trial court had subject matter jurisdiction over McKenna's action.

[¶4] We initially granted certiorari in this case to review the court of appeals' holding regarding subject matter jurisdiction. After the parties briefed that issue, we granted McKenna's motion for leave to conduct supplemental briefing on the issue of whether McKenna had standing to bring his TCPA claims, given that he was asserting rights purportedly assigned to him by the original recipients of fax transmissions. This supplemental issue had not been addressed by the trial court or court of appeals.

II. Analysis

[¶5] Congress enacted the TCPA in 1991. In addition to limiting certain telephone solicitations, the TCPA also prohibits sending advertisements to fax machines except under certain conditions, such as when the recipient has an established business relationship with the advertiser. The TCPA provides that persons aggrieved by violations of its terms may:

> if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State —
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

TCPA § 227(b)(3).

[¶6] The TCPA is silent as to whether claims for violations of its provisions may be assigned so that parties such as McKenna may sue with regard to faxes they did not personally receive. If such claims may not be assigned, then McKenna lacks standing to bring his claims. This is because standing requires an "injury in fact" to a legally-protected right. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000). Without a valid assignment, McKenna cannot "stand in the shoes" of the party who suffered an alleged injury in fact, and thus cannot claim any

injury to his rights. *See Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994). McKenna must rely on assignment to obtain standing, given that third-party standing is unavailable to McKenna because the TCPA only vests third-party standing in the state attorney general or other official or agency designated by the state, TCPA § 227(f)(1), and because McKenna does not assert constitutional claims. *See State Bd. for Cmty. Colls. & Occupational Educ. v. Olson*, 687 P.2d 429, 435-36 (Colo. 1984).

[¶7] Though standing was not addressed by the trial court or court of appeals, standing is a jurisdictional issue that may be raised at any stage of an action, including on appeal. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *see Peters v. Smuggler-Durant Mining Corp.*, 910 P.2d 34, 38 (Colo. App. 1995), *aff'd on other grounds*, 930 P.2d 575 (Colo. 1997). We first address this threshold issue, before we address the merits. *See Ainscough*, 90 P.3d at 855.

[¶8] As an initial matter, McKenna argues that the issue of standing must be resolved by reference to federal law, to create a uniform interpretation of the federal statute at issue. We are not persuaded by this argument, because the TCPA only allows a private right of action in state courts "if otherwise permitted by the laws or rules of court of [the] State." TCPA § 227(b)(3). We construe this language as a statutory command to apply state substantive law in determining which persons or entities may bring TCPA claims in state court. *Cf. U.S. Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1118 (10th Cir. 2007) (applying state substantive law in determining which persons or entities may bring TCPA claims in federal court).

[¶9] McKenna argues that such a construction would frustrate a federal policy of uniformity in fax solicitation regulation, but the TCPA makes it clear that no such uniformity was intended by Congress. For instance, in addition to providing for the application of state law in determining who can file suit in state court, Congress provided that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits . . . the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements . . . ." TCPA § 227(e)(1). Such provisions make it clear that Congress contemplated differing state laws in the field of fax solicitation regulation, and differing state laws prescribing who can bring TCPA claims in state court. Accordingly, we apply Colorado law in determining whether an assignee has standing to bring a TCPA claim in Colorado state court.

[¶10] To determine whether a claim is assignable under Colorado law, we look to whether it survives the death of the person originally entitled to assert the claim. *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934) ("The general rule is that assignability and descendibility go hand in hand.").[1] The survival of actions is governed by section 13-20-101, C.R.S. (2003), which provides:

> All causes of action, except actions for slander or libel, shall survive and may be brought or contin-

---

1. *Cf. Matson v. White*, 122 Colo. 79, 84, 220 P.2d 864, 866 (1950) (indicating, without analysis of survivability, that contracts involving matters of personal trust or confidence, or for personal services, are not assignable).

> ued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed . . . .

(Emphasis added). If the claims of McKenna's assignors are claims for "penalties" that do not survive according to this statute, then those claims could not be validly assigned to McKenna.

[¶11] Though the TCPA allows aggrieved parties to recover their actual monetary loss, TCPA § 227(b)(3), McKenna only seeks an award of $500 for each fax transmission, plus a trebling of that amount for willful violations. McKenna does not seek compensation for actual monetary loss, nor does he plead that his assignor suffered any actual monetary loss. Therefore, we must assess whether McKenna's statutory claims for liquidated and treble damages constitute "penalties" such that they do not survive, and are therefore non-assignable.

[¶12] McKenna argues that if we apply state law to determine whether a statute imposes a penalty—as we do—we should apply the analysis set forth in our decision in *Credit Men's Adjustment Co. v. Vickery*, 62 Colo. 214, 161 P. 297 (1916). In that case, we found that a now-repealed statute was penal because it made the officers and directors of a corporation personally liable for corporate debts upon a failure to file an annual report. Id. at 217, 161 P. at 298. However, we held the statute was remedial (rather than penal) in providing a remedy to the corporation's creditors; the latter determination controlled. *Id.*; *see Bergren v. Valentine Hardware Co.*, 88

Colo. 52, 57, 291 P. 1038, 1040 (1930) (applying *Vickery*'s analysis); *Perini v. Cont'l Oil Co.*, 68 Colo 564, 566, 190 P. 532, 533 (1920) (same); *Interstate Savings & Trust Co. v. Wyatt*, 63 Colo. 1, 4, 164 P. 506, 507 (1917) (same).

[¶13] However, in the years since we decided *Vickery* we have developed a fuller, more nuanced test for determining whether a statutory claim is one for a penalty, in the context of determining the correct statute of limitation to apply. In this modern test we look to whether (1) the statute asserted a new and distinct cause of action; (2) the claim would allow recovery without proof of actual damages; and (3) the claim would allow an award in excess of actual damages.[2] *See Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 214 (Colo. 1984); *Carlson v. McCoy*, 193 Colo. 391, 393-94, 566 P.2d 1073, 1075 (1977). A statutory claim may be found to be a "penalty" under this test even if it results in a damage award to an individual, rather than the state; this is because the damage award is serving the public interest in deterring or punishing the conduct at issue. *Carlson*, 193 Colo. at 394, 566 P.2d at 1075.

[¶14] Today we apply this modern test to determine whether a statutory claim is a claim for a "penalty" as that term is used in our survival statute, section 13-20-101. We decline to adopt the test used in *Vickery*, and we overrule *Vickery* and the cases applying it to the extent they purport to set forth a test that differs from the one set forth in *Carlson* and *Palmer*.

---

2. It should be noted that this test is only used to determine whether a statute imposes a penalty. We use a different test to determine whether a contractual liquidated damages clause imposes a penalty. *See Rohauer v. Little*, 736 P.2d 403, 410 (Colo. 1987).

[¶15] Under the *Carlson/Palmer* test, McKenna's statutory claim for $500 in liquidated damages per fax transmission is a claim for a penalty. First, McKenna's claim arises under the TCPA, which created a new and distinct cause of action for sending unsolicited faxes. Second, if he prevailed, McKenna would recover at least $500—and as much as $1,500—per fax transmission without proving any actual damages. This brings us to the third prong of our test: while McKenna may argue that every unsolicited fax transmission necessarily causes damages in the loss of toner and paper, those damages would normally be de minimus. Should he prevail and recover at least $500 per fax transmission, McKenna would recover much more than the actual damages caused by each fax. An award of $500 would always exceed actual damages in terms of paper and toner used. Though McKenna argues that unsolicited faxes also damage the recipient by tying up his or her fax machine and disrupting business, this is not always the case—the TCPA's fax provisions are not limited to businesses, and in any event not every unsolicited fax to a business will disrupt that business. Even where an unsolicited fax to a business does cause an interruption, there has been no showing that such damages could consistently approach $500 per fax.[3]

[¶16] For these reasons, we find that a claim under the TCPA for $500 in liquidated damages per violation is a penalty that cannot be assigned. See *Carlson*, 193 Colo. at 394, 566 P.2d at 1075 (holding that a statute providing

---

3. McKenna asks us to take judicial notice of his submission to the Federal Communications Commission regarding the alleged interruption unsolicited faxes inflict upon his business. This untested, disputable declaration serving McKenna's own interests is not a proper subject of judicial notice. See CRE 201.

for treble actual damages is penal); *Atchison, Topeka & Santa Fe R.R. Co. v. Tanner*, 19 Colo. 559, 562-63, 36 P. 541, 542-43 (1894) (holding that a statute allowing recovery of twice the value of each animal killed is penal); *U.S. Fax Law Ctr., Inc. v. T2 Techs., Inc.*, No. 06CA0432, 2007 Colo. App. LEXIS 2378, *16 (Colo. App. Dec. 13, 2007) (selected for official publication) (holding that a TCPA claim for liquidated damages is a penalty under Colorado law); *U.S. Fax. Law Ctr., Inc. v. Data Design Specialists, Inc.*, No. s06CA0433, 2007 Colo. App. LEXIS 2454 (Colo. App. Dec. 20, 2007) (not selected for official publication) (same); *U.S. Fax Law Ctr., Inc. v. iHire, Inc.*, 362 F. Supp. 2d 1248, 1253 (D. Colo. 2005), *aff'd*, 476 F.3d 1112 (10th Cir. 2007) (same). For the same reasons, a claim for treble the amount of those liquidated damages is also a penalty that cannot be assigned.

[¶17] Because McKenna purports to assert by assignment an unassignable claim for a penalty, we find that McKenna lacks standing. Because of this holding, we need not address Kruse's alternative argument that McKenna's claim is unassignable because it is a privacy tort amounting to a "tort action[] based upon personal injury" per our survival statute, section 13-20-101. *Cf. iHire*, 476 F.3d at 1119-20 (holding that a TCPA claim is an unassignable personal claim); *U.S. Fax Law Ctr., Inc. v. Myron Corp.*, 159 P.3d 745, 746 (Colo. App. 2006), *cert. denied*, 2007 Colo. LEXIS 335, 2007 WL 1181623 (Colo. Apr. 23, 2007) (same); *McKenna v. Oliver*, 159 P.3d 697, 699-700 (Colo. App. 2006), *cert. denied*, 2007 Colo. LEXIS 341, 2007 WL 1181630 (Colo. Apr. 23, 2007) (same); *USA Tax Law Ctr., Inc. v. MBA Fin. Group, Inc.*, No. 05CA1671, 2007 Colo. App. LEXIS 56 slip op. at 5-8 (Colo. App. Jan. 18, 2007), *cert. denied*, 2007 Colo. App. LEXIS 56, 2007 WL 1181616 (Colo. Apr. 23, 2007) (not selected for official publication) (same); *Consumer Cru-*

sade, Inc. v. MBA Fin. Group, Inc., No. 04CA2366, 2006 Colo. App. LEXIS 1621 (Colo. App. Sept. 28, 2006), *cert. denied*, 2007 Colo. LEXIS 343, 2007 WL 1181619 (Colo. Apr. 23, 2007) (not selected for official publication) (same). Likewise, because we find that McKenna lacks standing, we need not address the issue of whether Colorado courts have subject matter jurisdiction over TCPA claims given the interaction of federal and state law at the time McKenna's assignors' claims arose.

III. Conclusion

We conclude that McKenna lacks standing to assert his claims under the TCPA, because he obtained them through void assignments. We therefore reverse the court of appeals, and remand for reinstatement of the trial court's dismissal of the action with prejudice.

COLORADO COURT OF APPEALS
Case No. 05 CA 0191

Douglas M. McKenna
Plaintiff-Appellant

v.

Michael G. Kruse, d/b/a Security Mortgage Brokers
Defendant-Appellee

ORDER REVERSING AND CASE REMANDED WITH DIRECTIONS

August 3, 2006

Division IV
Opinion by JUDGE CASEBOLT
Carparelli and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announce: August 3, 2006

Law Offices of Andrew L. Quiat, P.C., Andrew L. Quiat, Centennial, Colorado, for Plaintiff-Appellant

Larry Dean Valente, Westminster, Colorado, for Defendant-Appellee

[¶1] Plaintiff, Douglas M. McKenna, appeals the order dismissing his claims against defendant, Michael G. Kruse, for lack of subject matter jurisdiction. We reverse and remand for further proceedings.

[¶2] In his complaint, plaintiff alleged that defendant transmitted three unsolicited advertisements via telephone facsimile (fax) to Colorado residents in violation of 47 U.S.C. § 227 (2002), commonly known as the Telephone Consumer Protection Act (TCPA). The recipients of the faxes assigned their claims to plaintiff, and based on those claims he sought damages and injunctive relief.

[¶3] During trial, defendant objected to plaintiff's proposed findings of fact, conclusions of law, and judgment. The trial court treated the objection as a motion to dismiss for lack of subject matter jurisdiction to hear a claim under the TCPA. In doing so, the court acknowledged that it had previously determined the identical issue in other litigation pending before it.

[¶4] The court concluded that the grant of authority in the TCPA to state courts to hear such claims "if otherwise permitted by the laws or rules of court of a State" allowed states to prohibit the maintenance of TCPA claims, that the Colorado General Assembly had precluded such actions by its adoption of the Colorado Consumer Protection Act (CCPA), § 6-1-101, *et seq.*, C.R.S. 2005, and that it therefore lacked subject matter jurisdiction. Accordingly, it dismissed plaintiff's claims, and this appeal followed.

[¶5] Plaintiff contends the trial court erred in dismissing his complaint for lack of subject matter jurisdiction. We agree.

[¶6] We review *de novo* a trial court's determination regarding subject matter jurisdiction. *Seefried v. Hummel*, ___ P.3d. ____ (Colo. App. No. 04CA0960, July 28, 2005).

[¶7] We also review statutory interpretation *de novo*. *Colo. State Bd. of Accountancy v. Paroske*, 39 P.3d 1283 (Colo. App. 2001). When we interpret a statute, our primary task is to give effect to the legislative body's intent. *Mason v. People*, 932 P.2d. 1377 (Colo. 1997); *People v. Dist. Court*, 713 P.2d 918 (Colo. 1986). First, we look to the statutory language and construe it according to its plain and ordinary meaning. *Mason v. People, supra*. If the language is clear and the intent may be discerned with reasonable certainty, we need not resort to interpretative rules of statutory construction. *Mason v. People, supra*; *People v. Dist. Court, supra*.

[¶8] The TCPA prohibits the use of any fax machine to send unsolicited advertisements to another fax machine and creates a private cause of action for the recipients of unsolicited faxes to request injunctive or monetary relief. 47 U.S.C. § 227(b)(1)(C) (2002). The provision at issue here states:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State —
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> (C) both such actions.

47 U.S.C. § 227(b)(3) (2002)(emphasis added); *see also Chair King, Inc. v. GTE Mobilenet, Inc.*, 184 S.W.3d 707 (Tex. 2006) (Chair King II).

[¶9] After the TCPA became effective, confusion arose over the meaning of the statutory proviso, "if otherwise permitted by the laws or rules of court of a State." Courts across the country developed three approaches to interpret the phrase: opt in, opt out, and acknowledgement. *See Chair King II, supra* (providing an overview of each approach).

[¶10] The opt in approach "assumes that Congress intended to deprive state courts of jurisdiction over private TCPA actions, unless and until the state takes affirmative steps, either by legislation or court rule, to exercise jurisdiction over such actions." *Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, 353 (Colo. App. 2005). The opt out approach requires state courts to hear TCPA claims unless a state affirmatively refuses, by either legislation or court rule, to do so. *Consumer Crusade, Inc. v. Affordable Healch Care Solutions, Inc., supra.* The acknowledgment approach interprets the proviso as a "congressional recognition that neutral state laws and rules concerning the general jurisdiction of state courts and procedures therein are applicable to the federal cause of action." *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 857 A2d 1, 11 (Md. 2004).

[¶11] In *Consumer Crusade, supra*, a division of this court concluded that the TCPA phrase, "if otherwise permitted by the laws or rules of court of a State," merely acknowledges that states may apply their own rules of procedure, and consequently, that the Supremacy Clause

requires Colorado courts to exercise jurisdiction regarding private TCPA actions.

[¶12] We agree that, if the TCPA phrase is understood merely to acknowledge that states may apply their own rules of procedure, Colorado courts must exercise jurisdiction regarding private TCPA actions. And for the same reasons stated by the divisions in *Consumer Crusade*, we reject the opt in approach applied in *Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.*, 16 S.W.3d 815 (Tex. App. 2000).

[¶13] With regard to the opt out approach, even assuming Congress intended that the phrase would permit states to opt out of the statute, we conclude that Colorado did not do so in enacting the CCPA.

[¶14] In 1997, about six years after enactment of the TCPA, the General Assembly added provisions to the CCPA, which, in pertinent part, state that it is a deceptive trade practice when, in the course of business, a person "[s]olicits a consumer residing in Colorado by a facsimile transmission without including in the facsimile message a toll-free telephone number which a recipeint of the unsolicited transmission may use to notify the sender not to transmit to the recipient any further unsolicited transmissions." Colo. Sess. Laws 1997, ch. 133, § 6-1-105(1)(I) at 500.

[¶15] Giving the words and phrases in the 1997 CCPA their plain and ordinary meaning, we conclude that the provision creates a private cause of action under state law, and it says nothing about the TCPA or the right to bring claims under it in state courts. Although the provision's limitations on unsolicited faxes are less restrictive than the federal limitations with regard to the conduct of

those who transmit faxes, this fact alone does not manifest a clear legislative intent to deny parties seeking relief under the federal law access to state courts. *See Tafflin v. Levitt*, 493 U.S. 455, 459-60, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990)(quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 784 (1981): the Supremacy Clause creates a deep-rooted presumption in favor of state court jurisdiction, which may be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.").

[¶16] Thus, we conclude that Colorado residents retained the protections provided in the TCPA and could sue in state court under the TCPA, the CCPA, or both. Accordingly, we discern nothing in the 1997 CCPA provisions to preclude plaintiff from asserting a cause of action under the TCPA for faxes received while those provisions were in effect.

[¶17] In 2004, the General Assembly amended the provision, adding an explicit reference to the TCPA and permitting private suits regardless of whether unsolited faxes included a toll-free telephone number to enable recipients to demand removal from the mailing list. Section 6-1-702(1)(c), C.R.S. 2005. Although the 2004 General Assembly conformed the CCPA limitations on faxes to those in the TCPA, we decline to depart from the plain meaning of the 1997 provisions based in inferences regarding the reason the 2004 General Assembly repealed those provisions and passed new ones.

[¶18] Accordingly, here, under either an opt out or acknowledgment approach, the trial court erred in con-

cluding that it lacked subject matter jurisdiction and in dismissing plaintiff's complaint.

[¶19] We reject defendant's assertion that the factual underpinnings of this case affect the interpretation of the TCPA or the CCPA. The fax transmissions at issue here occurred between November 2002 and April 2003, but there was no change in these statutes either before or after those dates that would affect our interpretation.

[¶20] We likewise reject defendant's assertion that the TCPA provisions allowing a state attorney general to bring actions under the statute somehow precludes or limits individual claims. Nothing in the statute limits the entity that may bring the private cause of action that the statute creates. And defendant's reliance upon *Chair King, Inc. v. GTE Mobilenet, Inc.*, 135 S.W.3d 365 (Tex. App. 2004), as authority for that proposition is misplaced, given the reversal of that decision by the Texas Supreme Court in *Chair King II, supra*.

[¶21] We also reject defendant's assertion that the Tenth Amendment applies to preclude plaintiff's claim. Nothing in that provision or in cases interpreting it precludes state courts from having jurisdiction to enforce this federal statute. *See Levitt v. Fax.com, Inc.*, 857 A.2d 1089 (Md. 2004).

[¶21] The order is reversed, and the case is remanded to the trial court for further proceedings.

JUDGE CARPARELLI and JUDGE J. JONES concur.

Copy of GAO Report GAO-06-425, page 2

fax complaints—including procedures for receipt, acknowledgment, investigation, and enforcement—and to what extent has it taken such action? (2) What are the strengths and weaknesses of FCC's junk fax procedures? and (3) What challenges do FCC face in carrying out its junk fax responsibilities? In addition, we provide in appendix I of this report information on enforcement measures and penalties that have been established to protect consumers from other types of unsolicited advertising.

To assess FCC's procedures, implementation, and strengths and weaknesses, we reviewed the applicable statutes and FCC rules pertaining to junk fax enforcement. We interviewed FCC officials responsible for receiving junk fax complaints and taking enforcement actions. We obtained FCC data on junk fax complaints and enforcement actions and reviewed portions of the complaint database and enforcement spreadsheet. Although we discuss limitations to the complaint data in the report, we determined that these data were sufficiently reliable for us to present overall trends and approximate figures.[3] To identify challenges, we compared FCC's enforcement efforts with recognized performance management practices and reviewed applicable FCC performance goals, measures, and data analysis. Finally, we reviewed other statutes relevant to protecting consumers from unsolicited advertisements. We conducted our work from November 2005 through March 2006 in accordance with generally accepted government auditing standards. See appendix II for a more detailed explanation of our scope and methodology.

FCC has applied its procedures for receiving and acknowledging junk fax complaints to the rapidly increasing number of complaints; however, the numbers of investigations and enforcement actions have generally remained about the same. In 2000, FCC recorded about 2,200 junk fax complaints; in 2005, it recorded over 46,000. FCC has never separately publicly reported the annual number of junk fax complaints. Yet, since 2003, consumers have complained more to FCC about junk faxes than about any other issue under FCC's jurisdiction except indecency and obscenity in radio and television broadcasting. Both individual consumers and businesses can report junk fax complaints to FCC by e-mail, postal

[3]In particular, because of concerns over some missing data and data counting errors, we report only overall complaint numbers for 2000 through 2002, and approximate numbers at a more detailed level for complaints from 2003 through 2005.